Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Petitioner,

v.

JEFFREY DRINSKI, in both his individual and official capacity, and NEWTON COUNTY, INDIANA, a municipal unit of government,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the alternative nonlethal means of arresting a suspect that are available to a police officer at the time that deadly force is used to effect a seizure must be considered when determining whether the seizure violated the suspect's fourth amendment rights.

2. Whether the totality of the circumstances, including the provocation of the suspect and other circumstances preceding the use of deadly force, must be considered when determining whether the seizure violated the suspect's fourth and fourteenth amendment rights.

3. Whether a municipality violates a citizen's fourth amendment rights where the municipality fails to adequately train its police officers in the areas of the use of deadly force, pursuit and dealing with a mentally disturbed or intoxicated suspect, and as a result, deadly force is used by a police officer.

4. Whether a municipality violates a citizen's fourth and fourteenth amendment rights where the municipality fails to equip its police officers with alternative nonlethal means of effecting an arrest, and as a result, deadly force is used by a police officer.

STATEMENT OF PARTIES TO THE PROCEEDING

The Petitioner is Jo Ann Plakas, who brought this action in her individual capacity and, as administrator of the estate of Konstantino N. Plakas, deceased. She was the Plaintiff-Appellant in the case before the United States Court of Appeals.

The Respondents are Jeffrey Drinski, in both his individual and official capacity and Newton County, Indiana, a municipal unit of government. Newton County, Indiana has no parent companies or subsidiaries. Jeffrey Drinski and Newton County, Indiana, were the Defendants-Appellees in the United States Court of Appeals.

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REPORT OF OPINIONS

In *Plakas v. Drinski*, 811 F.Supp. 1356 (N.D. IN. 1993) (Civil No. H91-365), the Honorable Rudy Lozano entered summary judgment in favor of the defendants. The United States Court of Appeals for the Seventh Circuit affirmed in *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994) (Docket No. 93-1431).

JURISDICTIONAL STATEMENT

1. The District Court for the Northern District of Indiana entered a final decision on January 15, 1993, granting summary judgment in favor of the defendants.

2. The original jurisdiction of the United States District Court for the Northern District of Indiana was invoked pursuant to 28 U.S.C. §1343(3). This action arises under the following federal laws: the Civil Rights Act, 42 U.S.C. §1983 and the fourth and fourteenth amendments to the United States Constitution.

3. On March 21, 1994, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. No petition for rehearing has been filed.

4. No extension of time in which to file this petition for writ of certiorari has been granted.

5. The Supreme Court of the United States has jurisdiction to review the decision of the United States Court of Appeals pursuant to 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. amend. IV; U.S. Const. amend. XIV, sec. 1; and 42 U.S.C. §1983 (1991) are set forth in Appendix C.

STATEMENT OF THE CASE

This is an action for the wrongful death of the plaintiff's decedent, Konstantino N. Plakas, that resulted from the shooting of the plaintiff's decedent by defendant, Jeffrey Drinski, while trying to effect his arrest. On October 15, 1991, the plaintiff filed suit in the Northern District of Indiana, Hammond Division, against Jeffrey Drinski in his official and individual capacity, and against the Newton County Sheriff's Department, pursuant to 42 U.S.C. §1983. (Record of Proceedings, page 1; hereinafter referred to as "R. 1"). The plaintiff later substituted defendant Newton County, a municipal unit of government, for defendant, Newton County Sheriff's Department. (R. 7).

On August 25, 1992, the defendant moved for summary judgment under Count I of the Complaint on the issue of the defendant Drinski's liability. (R. 19). On October 21, 1992, defendant moved for summary judgment in favor of Newton County under Count II. (R. 39). The district court entered a decision on January 20, 1993, granting summary judgment in favor of both defendants.

An appeal was taken and in a decision entered on March 21, 1994, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of United States District Court for the Northern District of Indiana.

STATEMENT OF FACTS

Defendant Jeffrey Drinski (hereinafter referred to as "Drinski") was appointed as a patrolman by defendant, Newton County, Indiana (hereinafter referred to as "County") in September, 1989. Prior to that he was employed as a radio operator by the County. (Deposition of Jeffrey

Drinski at 5; hereinafter referred to as "Drinski").[1] His only other experience in law enforcement was as a jail officer from July 1987 to March 1988. (Drinski at 6). Drinski trained at the Indiana Law Enforcement Academy from October to December of 1989. (Drinski at 8).

Charles Mulligan was elected Sheriff of Newton County in 1987. (Deposition of Charles Mulligan at 8; hereinafter referred to as "Mulligan"). Mulligan had seven years experience as a patrolman and agent for the Baltimore City Police Department in the early 1970s. (Mulligan at 4-5).

At the Indiana Law Enforcement Academy, Drinski was trained on the subject of deadly force through lecture and interactive exercise. (Drinski at 11). The firearm trainings system utilized by the Academy does not train in the various aspects of confrontation including time, distance, barriers and pursuit. (Deposition of W. Kenneth Katsaris at 146-149; hereinafter referred to as "Katsaris"). Drinski did not attend any deadly force training courses after he left the Academy. (Drinski at 10). At the time Drinski started as a deputy for the County, he was handed all Department directives, including Directive 1.3 on deadly force, and instructed to read them. (Drinski at 28-29; Drinski Dep. Ex. No. 2; Mulligan at 16).

Section II-A of Department Directive 1.3 states that "[m]embers of this Department shall exhaust every reasonable means, before resorting to use of a firearm." (Katsaris at 140; Drinski Dep. Ex. No. 2, p. 2). Section III-A-5 of the Department Directive 1.3 states that officers may discharge their firearms only "[t]o effect the arrest or prevent the escape of a convicted felon or person who

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[1] Numerous depositions were submitted into the record which form the factual basis for the record on appeal. The depositions were not sequentially numbered by the district court clerk. Therefore, in this petition the depositions are identified only by name and deposition page number.

has committed or attempted to commit a felony, when other means are insufficient . . ." (Katsaris at 142; Drinski Dep. Ex. No. 2, p. 3).

The County did not give any instruction on its deadly force policy. (Drinski at 29). The County's training of officers is limited to making certain publications and videos available to its officers. (Mulligan at 12). The County encourages its officers to view the training videos but does not require viewing. (Mulligan at 12-13).

In February, 1991, the County did not issue any intermediary weapons to its officers to be used as a means of self-defense or to effect an arrest, but in 1992 was considering adding such alternative weapons. (Mulligan at 45-46). Drinski was not trained in pursuit of a suspect on foot, (Drinski at 94-95; Mulligan at 66; Katsaris at 166-167), when to curtail pursuit of a suspect or when to retreat. (Drinski at 13-14, 141). Neither Sheriff Mulligan nor Drinski were trained in the value of a canine unit as a means of pursuing and subduing suspects. (Drinski at 141; Mulligan at 35, 67).

On February 2, 1991, Steven Whitt and Glen Cain responded to an auto accident on State Road 10. (Deposition of Butch Cain, at 3-4; hereinafter referred to as "Cain;" Deposition of Steven Whitt, at 7-11; hereinafter referred to as "Whitt"). Glen Cain and Steven Whitt were certified first responders for the Lake Township Volunteer Fire Department. (Whitt at 4). As first responders both Cain and Whitt had received medical training and frequently given medical aid at the scene of motor vehicle accidents. (Cain at 4, 50; Whitt at 5).

Upon arriving at the scene Whitt found that the car of plaintiff's decedent, Konstantino N. Plakas (hereinafter referred to as "Plakas") had left the north side of the road and come to rest across a deep ditch filled with water. (Whitt at 7-11). Butch Cain found Plakas walking

along State Road 10 and stopped to speak with him. (Cain at 5-8). Plakas stated that he was the driver of the vehicle found in the ditch. (Cain at 6). Plakas was wet from the waist down. Plakas stated that he was fine except that he was cold. (Cain at 6-7). Cain examined Plakas including feeling both the back and sides of his head. (Cain at 7, 50-51). Plakas was not injured and was not in need of medical treatment. (Cain 7, 12). Plakas was very cooperative and got in Cain's vehicle. Cain drove Plakas back to the accident scene about 1 mile away. (Cain at 8-9).

Corporal David Koby and Sergeant Buddy King of the Newton County Sheriff's Department were at the scene of the vehicle accident as well as Barry Watson, an ambulance driver. (Cain at 10-11). Butch Cain told Officer Koby to check Plakas for intoxication since he could smell alcohol on Plakas' breath and Plakas was dozing off. (Cain at 11). Plakas signed a waiver of medical treatment after being examined by the Newton County ambulance service. (Cain at 12). Plakas was cooperative and told Officer Koby he would go to the sheriff's department for a breathalyzer test. (Cain at 14). Koby cuffed Plakas behind the back and patted him down. (Whitt at 12-13; Perras 78-79). Plakas complained that being cuffed behind the back hurt the burn scars on his chest. (Whitt at 13). Plakas' chest was covered with scars from childhood burns. (Cain at 25). Officer Koby opened the rear driver's side door of his marked squad car and Plakas got in on his own. (Whitt at 14-15).

Whitt and Cain returned to the fire station and within minutes received a call that they should return to State Road 10 because Plakas had escaped from Koby's vehicle 2-4 miles east of the accident scene. (Whitt at 17-18; Cain at 15-16). Upon returning to the scene, Cain assisted in the search for Plakas in a field north of State Road 10 and west of a private driveway. (Cain at 17-18).

Roy and Joyce Ailes lived in a house at the end of a long private lane to the north of State Road 10. (Deposition of Joyce Ailes at 4-6; hereinafter referred to as "J. Ailes"). Plakas had been dating their daughter Rachael Ailes for about four years and they were engaged to be married. (J. Ailes at 6-7). The Ailes house is the last house on the private lane and there is a state game preserve to the north of their property. (J. Ailes at 6, 15).

At around 10:00 p.m. that night, Joyce Ailes heard a loud bang outside her daughter's window. She looked outside the window and saw Plakas, who they refer to as "Dino." (J. Ailes at 6-7, 20-22). Joyce Ailes opened the door to let Plakas in and he fell into their living room. Plakas was handcuffed behind the back. Joyce and Rachael Ailes helped Plakas sit up. His shoes, pants and shirt were wet. Plakas stated that he had wrecked his car. (J. Ailes at 23-25). Plakas also stated that he needed help. (J. Ailes at 90). Plakas had multiple lumps to the head and bruises to his legs. (J. Ailes at 90-92; R. Ailes at 12, 30). It appeared that Plakas was in need of medical attention and was blacking out because of the head injuries. (J. Ailes at 92-93). They attempted to dry Plakas off and changed his wet socks. (J. Ailes at 94).

Roy Ailes entered the living room and spoke to Plakas. (J. Ailes 27; 96). Plakas was very upset and the Ailes tried to calm him. (Roy Ailes at 10; hereinafter referred to as "R. Ailes"). Plakas kept stating that he didn't do anything wrong. (R. Ailes at 10). The Ailes family calmed him down. (R. Ailes at 61). Mr. Ailes could see the lights from the police cars on State Road 10 from the windows of their house. (R. Ailes at 14). Roy Ailes told Plakas that he could not run from the police and he would help straighten things out. (R. Ailes at 14). Plakas agreed that Roy Ailes should go talk to the police rather than have them rush in on him. (R. Ailes at 14, 16). Roy Ailes got in his truck and drove down the private lane to State Road 10. (R.

Ailes at 18-19). When he reached the road he saw a Newton County squad car and police officers with flashlights. (R. Ailes at 18-19). He also saw fireman Cain and advised Mr. Cain that Plakas was at his house and was willing to come out and talk to them. (R. Ailes at 19).

Trooper Lucien Mark Perras of the Indiana State Police had responded to the scene and was assisting in the search for Plakas when Roy Ailes arrived. (Deposition of Lucien Mark Perras at 19-21; hereinafter referred to as "Perras"). He heard Roy Ailes advise Cain that Plakas was his daughter's boyfriend and was up at his house. (Perras at 21-22; R. Ailes at 19; Cain at 19). Roy Ailes waited by the State Road to direct other officers to the house. (R. Ailes at 19-20). Trooper Perras drove his squad car up the driveway and parked near the Ailes house. (Perras at 23). At that time Newton County Officers Drinski, Koby and King also arrived at the Ailes house, together with fireman Cain (Perras at 23; Cain at 20). Drinski positioned himself to watch the back door of the house. (Cain at 20).

At that point Plakas had not been violent and there was no reason to believe he would be violent. (Cain at 20; J. Ailes at 40). Glen Cain approached the front door of the Ailes house. (Cain at 21-22). He observed Plakas stepping through the handcuffs and getting them in front of his body. (Cain at 21). Cain entered through the front door with Officer Koby behind him. (Cain at 21). Plakas' calm disappeared when Cain entered the house and the tension escalated as Koby entered. (J. Ailes at 96, 99-100). Plakas jumped up and stated "I don't want anyone to hurt me." (Cain at 23). Plakas said to Koby "You hurt me." (J. Ailes, 97). He also complained that the handcuffs were hurting the scar tissue on his chest. (J. Ailes at 51; Cain at 24-25).

Plakas backed into the corner of the living room and as he backed up he bumped the fireplace tools, reached down and picked up a fireplace poker. (J. Ailes at 50; Cain

at 26). The fireplace poker was 2-3 feet long with a hook on the end. (Cain at 26-27). Plakas gripped it like a baseball bat. (Cain at 26). He was not swinging it but screamed at Cain and Koby. (Cain at 27). Plakas was not a threat to the Ailes family. (J. Ailes at 96; Cain at 29). Joyce Ailes had no fear for her life. (J. Ailes at 81). Several minutes after Plakas picked up the poker he rushed at Officer Koby and swung at Koby, striking him on the arm, as Koby ran out the front door. (J. Ailes at 56, 61; Cain at 27). Officer Koby never drew his gun while in the house. (J. Ailes at 105). Drinski and Trooper Perras then entered the house through the garage door with guns drawn. (Perras, at 24; J. Ailes at 105). As they entered they saw Plakas run out the front door. (J. Ailes at 64, 111; Perras at 24-25).

Roy Ailes arrived back in the yard of his house just as Plakas was coming out the front door. (R. Ailes at 24-25). Plakas stopped in the yard after bolting out of the house. (R. Ailes at 25, 29). The police officers drew their guns and Mr. Ailes jumped in and yelled, "Don't shoot, I'll talk to him." (R. Ailes at 29-30). The area of the yard was well lit. (R. Ailes at 30-31). Roy Ailes stood between the police officers with their drawn guns and Plakas. (R. Ailes at 31). Roy Ailes tried to get Plakas to put the poker down and surrender. (R. Ailes at 31-32). As Roy Ailes talked to Plakas, Plakas slowly backed down a hill in the Ailes' yard. (R. Ailes at 33-35, 68; Perras at 32). When they got to the bottom of the hill Plakas again stopped and listened to Roy Ailes, who was trying to convince Plakas to surrender. (R. Ailes at 35-36). Ailes thought for a moment that Plakas might put down the poker. (R. Ailes at 38). Plakas lowered the poker and there were changes in his demeanor that suggested he might surrender. (R. Ailes 65-66). As police moved in behind Ailes, Plakas turned, tripped over a wire fence, and ran. (R. Ailes at 38-39). The police then pursued Plakas while Roy Ailes returned to the area of the squad

cars. (R. Ailes at 41). The snow on the ground helped to illuminate the area and he could see them for some distance. (R. Ailes at 70-71).

Drinski pursued directly behind Plakas followed by Trooper Perras and Sergeant Buddy King. (Perras at 35, 42). Drinski and Perras were yelling, "Stop, police." (Perras at 33). Drinski and Perras had their guns drawn. (Perras at 33). Plakas was still cuffed in front, palm to back of hand. (Perras at 34). The police had no trouble keeping up with Plakas. (Perras at 35). The moon was bright and they had no trouble seeing Plakas even without flashlights. (Perras at 35). He left tracks in the snow as he crossed the field. (R. Ailes at 74).

As Plakas entered some thick brush he slowed down. (Perras at 36). After Plakas got through the thick brush he entered a clearing. (Perras at 37). The police maintained a distance of at least 10 feet. (Perras at 37). Plakas crossed the clearing, came up against heavy brush on the east side, stopped and faced them. (Perras at 38). They spoke for approximately 15 minutes. (Drinski at 64). Drinski told Plakas to surrender. (Perras at 40). Drinski also told Plakas that he could hit Drinski with the poker, as long as it was not in the head. (Katsaris at 119; deposition of Buddy King at 76; hereinafter referred to as "King;" King Dep. Ex. No. 3). At that time, Plakas was calm and the poker was resting on the ground. (Drinski at 64-66). Buddy King remained on the west edge of the brush outside of the clearing. (Perras at 41-42). Perras, Drinski and King never stopped to discuss strategy or their options. (Perras at 42). Drinski was holding a flashlight in his left hand and his gun in his right hand. (Perras at 44).

Plakas attempted to break through some thick brush on the southern edge of the clearing but could not. (Perras at 39, 44). Drinski positioned himself directly in front of the opening that Plakas had entered. (Perras at 44).

Perras was positioned to Drinski's left. (Perras at 44). Drinski and Perras stood about ten feet from Plakas. (Perras at 37). They continued to talk to Plakas for a few minutes. (Perras at 45). Plakas took a step toward Drinski, Drinski fired his gun and Plakas immediately fell to the ground, his body lying within a foot of the thick brush in the southeast corner of the clearing. (Perras at 45-49; Whitt at 27-28). There were small saplings in the clearing, but Drinski did not trip over any or fall down. (Perras at 47).

The shot was fired at approximately 11:00 p.m. (Perras at 74). At the time the shot was fired Perras did not feel he was threatened with bodily injury. (Perras at 48). The only weapon the handcuffed Plakas had was a poker. (Perras at 78-79). Drinski aimed at the center of Plakas' chest. (Drinski at 81). Drinski's bullet struck Plakas in the mid-chest. (Perras at 55-56). Plakas was semiconscious and moaning after being shot. (Perras at 55-56). The handcuffs were removed. (Whitt at 32). Plakas died soon thereafter from the gunshot wound.

At the time of the confrontation in the clearing, Perras had a canister of CS repellant on his belt. (Perras at 58). CS repellant is a weapon of intermediary force designed to be used at a distance of about ten feet. (Perras at 64-65). It is sprayed in the face of a suspect to subdue him without any permanent injury (Perras at 64-66). From the right distance it could have been used against a suspect holding a poker. (Perras at 66).

Approximately 10 minutes before Plakas was shot, Newton County Sheriff, Charles Mulligan, radioed and asked whether Drinski and King needed a canine unit. (*See* Answer to Request to Admit No. 1; Cain at 33-35, 47-48). The Newton County officers responded that a canine unit was not needed. (*See* Answer to Request to Admit No. 1; Cain at 33-35, 47-48). A canine unit trained to track, grasp and disarm suspects without serious injury could have been

brought in from Lake County in about 30 minutes. (Mulligan at 32-36, 59-62; Drinski at 125-131). At any time Drinski could have curtailed the pursuit without injury to himself or others. (Perras at 80). They were not aware of anyone else being in the isolated, wooded area. (Perras at 80-81). Drinski did not need to shoot Plakas to prevent his escape. (Perras at 82).

Drinski passed over nonlethal intermediary force options such as canines and tear gas. (Katsaris at 107-108). Drinski did not recognize that there are numerous intermediary weapons available, including chemical sprays and canines, which should be employed before deadly force. (Katsaris at 88-89, 143; Drinski at 126, 130-131). Drinski believed, based upon his training at the Academy, that the next level of force above a sharp-edged weapon would be a gun. (Drinski at 27, 34). Drinski also believed that based on his training he would have been justified in shooting Plakas even before the distance was closed and he believed Plakas became an immediate threat. (Drinski at 111-113). In the opinion of Sheriff Mulligan there was no need to shoot the suspect as long as distance was maintained. (Mulligan at 23).

ARGUMENT

I.

THE SHOOTING OF PLAKAS BY A POLICE OFFICER WAS UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.

In affirming the grant of summary judgment in favor of Drinski, the United States Court of Appeals for the Seventh Circuit held that "where deadly force is otherwise justified under the Constitution there is no constitutional duty to use nondeadly alternatives first." *Plakas v. Drinski*, 19 F.3d 1143 (No. 93-1431 at 11) (7th Cir. 1994). The Court further held that the fact that another

Newton County officer may have provoked Plakas to attack Drinski could not render the shooting of Plakas unreasonable. *Plakas*, at 10. In reaching its decision the Seventh Circuit departed from its earlier decisions and created conflicting law among the circuits. The Seventh Circuit's decision is inconsistent with this Court's pronouncement in *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985), that the constitutionality of a particular search and seizure should be determined based upon the totality of the circumstances. *See also Graham v. Connor*, 490 U.S. 386, 396 (1989).

A. The Shooting Of A Citizen By A Police Officer Is Unreasonable Under The Fourth Amendment Where The Police Officer Fails To Use Alternative Nonlethal Means To Effect The Arrest.

The United States Court of Appeals for the Seventh Circuit held that Drinski was under no constitutional duty to maintain distance from Plakas, to keep barriers between himself and Plakas, to attempt to disable Plakas through the use of a chemical spray or to attempt to disarm him through the use of a police dog. *Plakas* at 10-11. The Court held that "[t]here is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used." *Plakas* at 11. However, prior to its decision in the instant case the Seventh Circuit had considered the nonlethal alternatives available to a police officer in determining whether the use of deadly force was reasonable under the fourth amendment. The law in the Seventh Circuit is now in conflict with the law in the Ninth Circuit which requires a factual inquiry into whether a reasonable nonlethal alternative existed for apprehending a suspect at the time deadly force was utilized.

In *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992), the Seventh Circuit evaluated the other means available to

the defendant officer at the time the defendant used deadly force. The court stated that the officer could not have subdued the plaintiff "through lesser means, as she did not have her nightstick with her and she feared reaching for her chemical repellant would expose her weapon to Tom's grasp." *Tom*, 963 F.2d at 962. It concluded "Tom could not have been subdued except through gunfire." *Id.* Implicit in the court's analysis in *Tom* is the holding that alternative lesser force options must be considered in determining whether a seizure was constitutional. Similarly, in *Klein v. Ryan*, 847 F.2d 368, 375 n.9 (7th Cir. 1988), the Seventh Circuit stated that an officer had the alternative of moving out of the way of the suspect, and thus deadly force would not be necessary to prevent harm to the officer or other individuals.

Prior to the Seventh Circuit's decision in the instant case, the law regarding the use of alternatives to deadly force in the Seventh Circuit was consistent with the law in the Ninth Circuit. In *Brower v. County of Inyo*, 489 U.S. 593 (1989), *appeal after remand*, 884 F.2d 1316 (9th Cir. 1989), this Court held that a police attempt to stop a fleeing suspect through use of a roadblock was a seizure within the meaning of the fourth amendment and remanded the case for consideration of whether the roadblock did effect a seizure that was "unreasonable." *Brower*, 489 U.S. at 599-600. On remand the district court dismissed the complaint for failure to state a claim. On appeal after remand the Ninth Circuit held that the fourth amendment claim could not be dismissed for failure to state a claim. *See Brower*, 884 F.2d at 1318. The Court applied the two-part test set out in *Garner*. The Court reasoned that even if the "significant threat" prong of *Garner* were satisfied, there remained a question of fact as to whether a non-deadly alternative existed. *See Brower*, 884 F.2d at 1317-1318. The Ninth Circuit reversed the district court's dismissal of the Complaint and remanded the case, stating as follows:

> "Necessity is the second prerequisite for the use of deadly force under *Garner*. The necessity inquiry is a factual one: Did a reasonable non-deadly alternative exist for apprehending the suspect? . . . Here, it cannot be said with certainty that no non-deadly alternative existed."

Brower, 884 F.2d at 1318.

The diverging law in the Seventh and Ninth Circuit stems from different applications of *Garner*, a case in which this Court stated as follows:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used *if necessary* to prevent escape, and if, where feasible, some warning has been given."

Garner, 471 U.S. at 11-12 (emphasis added). In applying *Garner* the Ninth Circuit has held that the use of deadly force is not necessary, if a reasonable nondeadly alternative existed for apprehending the suspect. Prior to its decision herein, the Seventh and Ninth Circuits interpreted *Garner* in the same manner. The Seventh Circuit, however, has now clearly denounced its earlier decision in *Tom v. Voida*, stating as follows:

> "It is obvious that we said Voida thought she had no alternatives. But did we hold that this imposes a constitutional duty to use (or at least consider) the use of all alternatives?
>
> The answer is no. *Tom v. Voida* did not, and did not mean to, announce a new doctrine . . . As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras's CS gas, of how fast he

> could run backwards? Our answer is, and has been, no because there is too little time for the officer to do so and too much opportunity to second-guess that officer."

Plakas at 13.

In holding that a police officer need not use available nonlethal means to effect a seizure, the Seventh Circuit relied in part upon this Court's decision in *Illinois v. Lafayette*, 462 U.S. 640 (1983). In *Lafayette* this Court held that the reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means. *Lafayette*, 462 U.S. at 647. More recently, in assessing the constitutionality of an investigatory stop this Court stated: "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, 470 U.S. 675, 687 (1985). The issue in *Lafayette* was the reasonableness of a police inventory search of an arrestee's personal effects incident to incarceration. A citizen's privacy interest in the contents of his car, subsequent to arrest, cannot compare to his right to life. As this Court stated in *Garner*, a "suspect's fundamental interest in his own life need not be elaborated upon." *Garner*, 471 U.S. at 9. Therefore, *Lafayette*, which was decided prior to *Garner*, is not dispositive of the deadly force issue in this case.

In the Seventh Circuit, a police officer who, in attempting to prevent the escape of a handcuffed fleeing suspect, chases the suspect until cornered and approaches to a distance that the officer feels threatened with serious physical harm may use his gun to kill the suspect. His actions are deemed reasonable as a matter of law even if the suspect could reasonably have been taken into custody without serious risk of harm to anyone. The Ninth Circuit, in contrast, interprets the *Garner* necessity prong as re-

quiring that nondeadly alternatives be utilized if reasonably capable of subduing a suspect without injury to the police officer.

The divergent opinion of the Seventh Circuit has created an anomaly in which the fourth amendment permits a police officer in the Seventh Circuit to shoot a suspect although he could have been taken into custody alive through the use of chemical sprays, police dogs or other intermediate means of force. In the Ninth Circuit the fourth amendment protects a citizen from the same police conduct. The Constitution requires police use of force to be reasonable and necessary. Given that force is sometimes necessary, is not the most reasonable force that which is both effective and least injurious? This Court should grant certiorari, and further define the necessary use of deadly force by a police officer as permitted under the fourth amendment.

B. The Shooting Of A Citizen By A Police Officer Violates The Fourth And Fourteenth Amendments Where The Unreasonable Conduct Of Police Officers At Any Time During The Pursuit Of A Suspect Creates The Justification For The Use Of Deadly Force.

The plaintiff produced evidence in the district court that Newton County Officer David J. Koby beat Plakas after Plakas was detained, patted down and handcuffed. The plaintiff also produced evidence that Drinski invited Plakas to strike him with the fireplace poker shortly before Drinski fired the fatal shot, claiming self-defense. The Seventh Circuit failed to see the relevancy of this evidence to the issue of reasonable use of deadly force. *See Plakas* at 9-14. The Seventh Circuit's focus only on the moment immediately preceding the police shooting is inconsistent with this Court's holdings in *Garner* and *Graham* that in assessing the reasonableness of a search or seizure a court must consider the totality of the circumstances. *See Garner*, 471 U.S. at 8-9; *Graham*, 490 U.S. at 396. The Seventh Cir-

cuit's narrow view of the relevant time frame preceding the police shooting is a departure from its earlier decisions and in conflict with the law in at least one other circuit that has considered this question.

In *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992), the Seventh Circuit considered the issue of reasonable use of deadly force by scrutinizing all areas of police conduct leading up to the shooting, summarizing its decision as follows:

> ". . . Voida was justified in attempting to handcuff Tom because she then had a reasonable suspicion that he was engaged in criminal activity. In addition, Tom's continued flight from her, even after she had ordered him to stop, had given her probable cause to arrest him. Voida was justified in following him after the initial physical encounter because by this time he had committed at least two crimes. And she was ultimately justified in using deadly force because Tom had already inflicted serious bodily injury on her and threatened to continue doing so."

Tom, 963 F.2d at 962. In the instant case the Seventh Circuit stated that, as in *Tom*, the proper analysis is to "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage." *Plakas* at 14. However, the court expressly declined to consider the consequences of prior police conduct on the ultimate use of deadly force. The court found that Drinski had acted reasonably up to the time he was facing Plakas in the clearing; therefore, the sole focus in determining whether Drinski acted reasonably in shooting Plakas was from that point forward. As the court stated:

> "All of this means Drinski was properly standing in the clearing, gun in hand, several feet away from Plakas, who charged him with the poker raised. It is from that point on that we judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct."

Plakas at 14. In taking this "snapshot" view of the shooting and basing its reasonableness determination only on the circumstances at the moment the shot was fired, the court avoided the evidence that Plakas was beaten by Newton County Officer Koby. The court also avoided the issue by holding that even excessive force exerted by another officer in the department after Plakas' arrest would not render Drinski's claim of self-defense unreasonable, stating as follows:

> "Even if Koby did beat Plakas, Koby was not at the scene of Plakas's demise. The officers who confronted Plakas were not the officers who injured him and should be able to claim self-defense. The proposition that an officer who beats John Doe may not use self-defense to justify killing Doe, who later attacks him, rests on the idea that because the officer's wrongful acts caused the attack, he cannot take advantage of his fear of retaliation to defend against liability. Drinski did not cause Plakas to attack him. He can claim self-defense to shooting Plakas."

Plakas at 10 (citations and footnote omitted). Finally, the Seventh Circuit dispensed with the issue whether Drinski himself unreasonably provoked an attack by Plakas, by inviting Plakas to strike him, in a footnote to the opinion, stating in part as follows:

> "There is no contention that this 'invitation' immediately preceded the shooting or caused Plakas to charge Drinski. The only argument in this case is that Plakas did not charge at all."

Plakas at 16. However, the Court overlooked this issue which was stated in Plakas' reply brief as follows:

> "Drinski invited plaintiff to strike him with the poker, knowing at the time that he was irrational. (King Dep. Ex. 3 at 4; King at 76-77; Katsaris at 119). A reasonable officer would not invite an irrational suspect to strike, and then shoot him."

Reply Brief of Plaintiff-Appellant at 7.

In *Gilmer v. City of Atlanta*, 774 F.2d 1495, 1502 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986), the Eleventh Circuit held that a series of constitutional violations could render "unreasonable" the eventual use of deadly force when the suspect retaliates against the officer. In *Gilmer* the plaintiff's decedent, Patillo, was beaten by two police officers and then shot as he moved toward one of the officers. The Court found that the shooting violated Patillo's fourth and fourteenth amendment rights, stating:

> "[A]ny fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power.
>
> . . .
>
> "Furthermore, the police had little cause to believe Patillo himself to be dangerous. Given his small size, intoxicated state, and lack of a weapon, he clearly posed little threat to their safety when they initially began escorting him to the patrol car. Finally, . . . Patillo did little to provoke the police officers to beat him. That unwarranted intrusion, as well as the unwarranted shooting which directly resulted from his efforts to escape the officers' further physical abuse, give grounds for relief under the fourth amendment.

Gilmer, 774 F.2d at 1501-1502.

The Eleventh Circuit, in *Gilmer*, correctly applied this Court's ruling in *Garner* and considered all circumstances leading up to the use of deadly force, including the series of constitutional violations. The Eleventh Circuit concluded that an officer's unjustified beating of a suspect will invalidate the use of deadly force when the suspect retaliates against the officer. A seizure may be unreasonable if the officer creates the need to use deadly force. As the Ninth Circuit stated in *Brower*:

> "It is not clear from *Garner* that the 'substantial threat' requirement is satisfied by danger that is pres-

> ent only as a result of police pursuit . . . . In this case it might be argued that the substantial threat requirement was not met because any danger proceeded from the fact that the police gave chase. This is not to say that the police should never chase suspected car thieves, only that the danger created by the chase would not give them license to use deadly force when it is necessary to prevent escape."

Brower, 884 F.2d at 1317-1318 n.1. In another recent decision, the Seventh Circuit referred to the foregoing footnote in *Brower* in stating that "[t]he Supreme Court has not clearly delineated the scope of the *Garner* exception." *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994). However, in *Donovan* the Court did not consider whether the "substantial threat" requirement of *Garner* was satisfied by the danger that was present only as a result of Officer Zirbes' pursuit, holding "[b]ecause we decide this case on qualified immunity grounds . . . we need not decide today whether Zirbes' alleged conduct actually violated the Fourth Amendment." *Donovan*, 17 F.3d at 944. The Seventh Circuit appears to have earlier decided this issue in *Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), stating as follows:

> "If a fleeing felon is converted to a 'threatening' fleeing felon *solely* based on the actions of a police officer, the police should not increase the degree of intrusiveness. In other words, we have no countervailing governmental interest in unreasonable police conduct that would justify a greater intrusion on the individual's rights."

However, in the instant case the Seventh Circuit departed from *Starks* without comment. The Seventh Circuit should have considered whether the foot pursuit and other police conduct converted Plakas from a "fleeing felon" to a "threatening fleeing felon." The Seventh Circuit erred in limiting the inquiry to the circumstances that exist at the precise moment the shot was fired.

The conduct of police in creating the need to use deadly force in self-defense would violate either the fourth amendment right not to be subjected to unreasonable seizures or the right to substantive due process under the fourteenth amendment. However, substantive due process analysis is inherently subjective and police officers might be unable to predict when certain conduct will shock the conscience. Note, *Police Liability for Creating the Need to Use Deadly Force in Self-Defense*, 86 MICH. L. REV. 1982, 2006-2007 (1988). The fourth amendment balancing test is susceptible to universal rulemaking which will give clearer guidance to police. *Id.* at 2008-2009. In the instant case, this Court should find that the police seizure of Plakas violated his fourth amendment rights.

The initial seizure of Plakas took place when Officer Koby handcuffed him. The handcuffing of Plakas' arms behind his back caused Plakas great pain because he had burn scars up and down his chest. The seizure became unreasonable as Plakas was beaten and mistreated by officers of Newton County.

At the time Plakas was taken into custody he was examined by medical personnel who determined that he had no lumps or injuries to his head and was not in need of medical treatment. (Cain at 7, 12). After being taken into custody, Plakas allegedly escaped from a locked squad car with his hands cuffed behind his back. (Whitt at 17). He arrived at the Ailes house with bruises on his head and in obvious need of medical treatment. (J. Ailes at 90-93; R. Ailes at 12, 30). Plakas had been very cooperative when arrested but later became enraged at the sight of the police. (Cain at 7; J. Ailes at 96). At the Ailes house Plakas stated to Officer Koby "You hurt me." (J. Ailes at 97). These facts, when read in the light most favorable to the plaintiff, permit a jury to infer that Plakas was beaten after being taken into custody and handcuffed. The application of such force was patently unreasonable.

After Plakas ran out of the Ailes home, Drinski, along with two other officers, pursued him on foot with their guns drawn, and eventually cornered Plakas. Encroaching upon an individual is a level of force. (Katsaris at 154). This force, in light of the circumstances, was unreasonable because Plakas did not pose a threat of harm unless someone closed in on him. Thus, Drinski could have maintained his distance and negotiated with Plakas to the point of surrender or used other nonlethal force options. By encroaching upon Plakas, Drinski created any threat of imminent harm there may have been. When Drinski made a conscious decision to eliminate all nonlethal means of effecting a seizure, he in effect created any need for the use of deadly force (*see* Katsaris at 98). Drinski's unreasonable conduct continued as Drinski invited Plakas to strike him with the poker as long as he did not strike him in the head. The unnecessary use of force to escalate the threat of harm invalidates the subsequent use of deadly force, regardless of whether the unnecessary force was used by Drinski or by another officer in his department.

In the instant case, if Drinski had handed the unarmed plaintiff the fireplace poker and minutes later shot him at close distance because of the threat of the poker, the shooting would be justified under the Seventh Circuit's analysis, notwithstanding the outrageousness of the police conduct. The need for a broader inquiry is just as apparent on the facts of record where Drinski and his fellow officer created any justification for the shooting by first provoking him to resist arrest then approaching to within a close distance and offering to let Plakas strike him with the poker. This Court should adopt a standard of reasonableness that would prohibit police from creating the need to use deadly force in self-defense.

The issue of whether the shooting itself was unconstitutional should not be examined in isolation from other

police conduct. The prior unconstitutional acts render the ultimate act unconstitutional, even if that use of deadly force appeared justified by the immediate threat presented. The Seventh Circuit has failed to consider the totality of the circumstances leading up to the use of deadly force in determining the constitutionality of the seizure. The Seventh Circuit's analysis is at odds with prior decisions of this Court and the Eleventh Circuit. This Court should grant certiorari and resolve the conflict among the circuits. A more expansive consideration of the circumstances preceding the use of deadly force by a police officer would ensure that a citizen's right to be free from unreasonable searches and seizures is protected.

II.

THE MUNICIPALITY VIOLATED THE CITIZEN'S RIGHT NOT TO BE SUBJECTED TO AN UNREASONABLE SEIZURE BY IMPROPERLY TRAINING AND EQUIPPING ITS POLICE OFFICERS.

The Seventh Circuit affirmed the district court's entry of summary judgment in favor of Drinski; therefore, the court did not address the issue whether the County failed to properly train its officers. Plakas presented expert testimony in the district court that the County improperly trained its officers in several respects resulting in the death of Plakas. This Court should grant certiorari to consider the scope of police training required by its decision in *City of Canton v. Harris*, 489 U.S. 378 (1989). This Court should also grant certiorari to consider whether the fourth and fourteenth amendments impose a duty on municipalities to equip their officers with weapons that can be safely used to subdue a suspect without resulting in serious bodily injury or death. The Seventh Circuit, in the instant case, found that a governmental unit has no constitutional duty to adequately equip its officers.

A. The Municipality Acted In Conscious Disregard Of The Citizen's Right Not To Be Subjected To An Unreasonable Seizure By Failing To Train Its Police Officers.

Liability may be imposed upon a municipality under §1983 based upon the municipality's "deliberately indifferent" training policies if those policies are shown to be a direct cause of the violation of the plaintiff's federally protected rights. *City of Canton*, 489 U.S. at 388. A deliberate indifference to training is established if, in view of the duties assigned to an officer, the need for enhanced training is so obvious that the inadequacy of training is likely to result in the violation of constitutional rights. *Erwin v. County of Manitowac*, 872 F.2d 1292, 1298 (7th Cir. 1989). Plakas had a federally protected right to be free from unreasonable seizures. The failure of the county to train Drinski resulted in the violation of Plakas' constitutional right.

In *Davis v. Mason County Washington*, 927 F.2d 1473, 1482 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 275 (1991), the court, citing *City of Canton*, held that the "County's failure to adequately train its deputies [with respect to lawful use of force] constituted deliberate indifference as a matter of law." "The issue is not whether the officers had received *any* training—most of the deputies involved had some training, even if it was minimal at best—rather the issue is the adequacy of that training." *Davis*, 927 F.2d at 1483. Other courts have held that a municipality may be liable for improperly training its officers on matters relevant to the instant case. *See, e.g. Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1556-71 (11th Cir. 1989) (use of a canine); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. IN. 1991) (subject of pursuit); *Wierstak v. Heffernan*, 789 F.2d 968, 975 (1st Cir. 1986) (subject of pursuit); *Parker v. District of Columbia*, 850 F.2d 708, 713 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (arrest procedures); and *Russo v. City of Cincinnati*, 953

F.2d 1036 (6th Cir. 1992) (dealing with mentally disturbed or intoxicated suspects).

Plakas' expert, Ken Katsaris, testified to several deficiencies in the County's training program. His testimony presents a sufficient factual basis for finding that the County's inadequate training of its officers caused Plakas' death. Ken Katsaris is a former sheriff who presently trains police officers nationally on the use of force. Ken Katsaris reviewed the depositions of several County employees and other witnesses at the scene and formed opinions based on their testimony. (Katsaris at 34). In his expert opinion, Drinski's training was inadequate on the subject of deadly force and resulted in the death of Plakas.

The police expert based his opinion on the fact that the training that Drinski received at the Academy was one dimensional and did not adequately train Drinski in the use of deadly force and how to deal with confrontation. (Katsaris at 125, 138-160). The County did not train Drinski on its deadly force policy. (Drinski at 29). A police department should reasonably know that a deadly force policy will not be followed unless the department instructs its officers on the policy. (Katsaris at 125, 138, 141-142, 160). Based upon his inadequate training at the Academy, Drinski passed over nondeadly force options, and the result of the failure to train was a needless death. (Katsaris at 89, 107-108; Drinski at 27, 34). As a result, Drinski violated the County's own policy which required that officers exhaust every reasonable means before resorting to deadly force. (Katsaris at 140, 142; Drinski Dep. Ex. No. 2, pp. 2-3).

In addition, Drinski and Sheriff Mulligan were utterly untrained in the use of canine units as an intermediary force option. (Drinski at 141; Mulligan at 35, 67). The County's training program was below national standards. The inadequate training resulted in Drinski not recogniz-

ing an available canine unit that was suggested by the sheriff over the radio as an alternative option to deadly force which could have been used to intimidate Plakas into surrendering or to disarm Plakas, sparing his life. (Katsaris at 110; Drinski at 126, 130-131).

Drinski's lack of training in the use of chemical agents also contributed to the death of Plakas. As a result of improper training Drinski failed to consider and use a chemical agent to subdue Plakas. (Katsaris at 107-108, 110). Further, Drinski was not trained in the means of pursuing a suspect on foot. Drinski was not trained in when to curtail pursuit of a suspect or when to retreat. (Drinski at 13-14, 141). Under nationally recognized standards he should have maintained distance and barriers between himself and the suspect. (Katsaris at 89-90). A reasonably trained officer would have known that a handcuffed arrestee, who was cold and inebriated, should not be cornered or encroached upon but should be given time to surrender. (Katsaris at 152-154). Drinski was improperly trained in that he approached to within 10-12 feet of a suspect armed with an impact weapon without maintaining barriers between himself and the suspect. (Katsaris at 90-91, 97). Drinski's invitation to let Plakas hit him with the poker as long as he did not hit Drinski in the head also reflects improper training. (Katsaris at 119). As a result, Drinski shot a traffic violator who was not attempting to injure or take life but to flee. (Katsaris at 117).

A reasonably trained officer would have an understanding of human behavior. (Katsaris at 152). Drinski should have known that Plakas was drunk and acting irrational, and that given time he would have calmed. (Katsaris at 151). The officer should also have known that being cold, wet and handcuffed was a handicap. (Katsaris at 151-154). Drinski should have merely kept Plakas in sight from a distance until he was ready to give up or nondeadly force options were utilized. (Katsaris at 150-154).

The police expert testimony provides evidence for the trier of fact to find that the County's training in the areas of use of deadly force, pursuit and confrontation of a suspect armed only with an impact weapon, alternatives to deadly force, and dealing with a mentally disturbed or intoxicated suspect was inadequate resulting in the death of Plakas. This Court should grant certiorari to clarify the duty to train police officers established in *City of Canton* and determine whether the expert testimony presented is sufficient to establish a deliberate indifference to the rights of citizens with whom the police come in contact.

B. The Municipality Acted In Conscious Disregard Of The Citizen's Right Not To Be Subjected To An Unreasonable Seizure And Right To Due Process Of Law By Failing To Equip Its Police Officers With Nonlethal Weapons.

The use of deadly force against Plakas resulted from the County's failure to equip its officers with intermediary force weapons. The Seventh Circuit held that there is no constitutional duty to equip police officers to confront a suspect who is fleeing or resisting arrest. By failing to adequately equip its officers to deal with a foreseeable situation, however, the County created the circumstances that resulted in Plakas' death. In only equipping its officers with firearms the county violated Plakas' fourth amendment right not to be subjected to unreasonable seizure and his fourteenth amendment right to due process of law.

In February, 1991, it was the policy or custom of the County to equip its police officers with nothing more than a handgun, shotgun, handcuffs, flashlight and radio. (Drinski at 100-101). At that time the County did not issue, or make available, intermediary force weapons such as impact weapons (baton) or chemical sprays (tear gas). (Drinski at 100-106). The County now issues tear gas and is

considering other intermediary force options such as nightsticks. (Drinski at 105; Mulligan at 45-56). It is nationally recognized that police officers should have available to them some form of intermediary force. (Katsaris at 47, 64). In February, 1991, the County was operating under a policy or custom that resulted in the excessive use of force and deprived Plakas of his constitutional rights.

This Court has held that a municipality may be liable for adopting a policy, or following a custom or practice, that deprives citizens of their constitutional rights. *See Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). In the instant case, the Seventh Circuit refused to extend *Monell* to require police departments to supply their officers with equipment that allows the apprehension of suspects without risk of serious injury to the police or the suspect. In rejecting Plakas' contention that the fourth and fourteenth Amendments impose on police departments a duty to equip, the Seventh Circuit stated as follows:

> "We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police force). There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the Constitution does not enact a police administrator's equipment list. We decline to use this case to impose constitutional equipment requirements on the police."

Plakas at 15-16 (footnotes omitted). In reaching its decision the Seventh Circuit relied in part upon *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992).

In *Salas* the family of a hostage who was shot and killed by the man who held her hostage filed a section 1983

claim against a sheriff claiming, among other things, that his failure to provide SWAT or hostage negotiation equipment to the sheriff's department caused her death. The Fifth Circuit rejected the claim holding that the constitution does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations. *Salas*, 980 F.2d at 310. With no constitutional duty to provide SWAT or hostage negotiation equipment, the sheriff's failure to do so was not a denial of due process. *Id.*

The instant case is distinguishable from *Salas* and a duty to equip should be imposed. Plakas had already been taken into police custody, patted down and handcuffed. Plakas was killed by police, not by a third-party. It was reasonably foreseeable that the County would on a regular basis confront suspects who would resist arrest and that in the absence of another choice of weapon, the policeman's gun would be used in the confrontation. In adopting a policy not to equip its officers with nonlethal weapons, the County violated Plakas' constitutional rights.

Implied in the fourth amendment right not to be subject to unreasonable searches and seizures or the fourteenth amendment right to due process of law is the duty to equip police officers with devices designed for nonlethal control of those who refuse to surrender to police. The development of chemical sprays and numerous other devices that allow the capture of a suspect without serious injury has radically changed the assessment of what force is reasonable and necessary to effect a seizure. The shooting of a suspect that might have been justifiable by police when guns were the only weapon manufactured that would prevent injury to police, is no longer reasonable in light of the equipment now manufactured for police departments. The constitution compels police departments to adopt the more humane tools and tactics that are now available. This Court should grant certiorari and impose

a duty on municipal units of government to equip police with at least one nonlethal way of taking an unwilling suspect into custody. Unless this Court imposes a duty to equip, police departments will continue to furnish their officers with only firearms and justice will continue to be meted out with the pull of a trigger.

CONCLUSION

The Petitioner respectfully requests that this Honorable Court grant Petitioner's petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, decide the questions presented herein and reverse the judgment of the United States District Court of the Northern District of Indiana and the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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